IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5206

HARRY ROBERTS,

Petitioner,

versus

LOUISIANA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Louisiana

BRIEF OF STATE OF LOUISIANA, RESPONDENT

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STATEMENT OF THE CASE

Shortly after 6:30 p.m. on Mardi Gras Day, 1974, Officers John Tobin and Dennis McInerney of the New Orleans Police Department, who were in uniform and were assigned to patrol and answer radio signals in police car 504, received a radio signal of a shooting at 1628 Pauger Street in New Orleans, and at once drove toward that address. When they arrived at the corner of

Pauger and Burgundy Streets they were flagged down by Mrs. Theresa Dorsey, who gave them a description of the person they were looking for (beige jacket, blue jeans, green shirt, and red bandana with knot tied in the back), and who pointed in the direction in which the shootist was fleeing. Proceeding in the direction indicated and with their emergency lights flashing, Officers Tobin and McInerney came upon Harry Roberts at the corner of Kerlerec and Burgundy. Roberts was just turning the corner and was removing a red bandana from his head. The officers gave chase and finally caught up with him on Rampart Street between Kerlerec and Esplanade. They parked the police car at an angle, right in front of Roberts. As Officer Tobin started to open the door of his vehicle, Roberts ran up and shot Tobin in the leg and head. When Officer McInerney jumped out of the police car he was mortally wounded by Roberts' gunfire and fell to the ground, dying almost immediately. Although severely wounded, Officer Tobin managed to draw his service revolver and shoot Roberts in the left leg, whereupon the accused, leaving a trail of blood, ran off and took refuge in the residence of Mrs. Mable Domingo at 918 Kerlerec, where he was captured by the police shortly thereafter. Tr. 1-36; 118-122.[1]

The Grand Jury for the Parish of Orleans indicted Harry Roberts for the first degree murder of Dennis McInerney, a police officer. R. 21. The accused was tried, convicted, and mandatorily sentenced to death. R. 1-22. He appealed to the Louisiana Supreme Court,

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1 See transcript of Louisiana trial proceedings. All record and transcript citations in this brief refer to the Louisiana Supreme Court record which has been forwarded to this Court.

which affirmed his conviction and mandatory death sentence. *State v. Roberts*, 331 So.2d 11 (La. 1976). He petitioned this Honorable Court for a Writ of Certiorari, which was granted on November 8, 1976. Two weeks later this Court entered an order in this case limiting the grant of certiorari to the question of "whether the imposition and carrying out of the sentence of death for the crime of first-degree murder of a police officer under the law of Louisiana violates the Eighth and Fourteenth Amendments to the Constitution of the United States."

PROCEDURAL OBJECTIONS RAISED BY PETITIONER IN BRIEF

On August 12, 1976, Harry Roberts filed his Petition For Writ Of Certiorari in this Honorable Court asking, among other things, that the imposition and carrying out of the mandatory sentence of death which he had received under Louisiana law for first degree murder be held to violate the Eighth and Fourteenth Amendments' ban against cruel and unusual punishments.

At the time petitioner filed his application for certiorari on August 12, 1976, *Stanislaus Roberts v. Louisiana*, 428 U.S. 325 (1976), had already been handed down by this Court on July 2, 1976, and La. Act. 657 of 1976 had already been enacted by the Louisiana Legislature in July of 1976.

Now, following this Court's grant of certiorari herein on November 8, 1976, and its order of November 29, 1976, limiting the grant of certiorari to the con-

stitutionality of the death sentence, petitioner theorizes in the brief which he has filed in this proceeding that this Court has no jurisdiction to entertain the instant case 1) because the Louisiana Supreme Court has not had an opportunity to consider the validity of the mandatory death sentence imposed on him in the light of *Stanislaus Roberts v. Louisiana*, nor has the Louisiana Supreme Court, he argues, specifically considered the constitutional validity of section (2) of La. R.S. 14:30, here at issue; and 2) because La. Act 657 of 1976, which amended and reenacted the murder statute under which he was convicted and sentenced, contained no saving clause and hence, in his view, "there is no criminal liability now existing on the part of the petitioner as regards first degree murder." See petitioner's brief, p. 28.

The State of Louisiana is of the respectful belief that by applying to this Court for a writ of certiorari to review his cause, instead of first pursuing the questions here being urged in the Louisiana courts, petitioner has waived all right to raise these procedural contentions now that, at his request, certiorari has been granted in the matter by this Court.

Alternatively, the State of Louisiana respectfully submits that the procedural issues argued herein by petitioner are absolutely lacking in merit, as will be shown below.

1. **The Question Under Review Has Been Ruled On By The Louisiana Courts**

Both the Louisiana trial court and the Louisiana Supreme Court upheld the constitutionality under the

Eighth and Fourteenth Amendments of La. R.S. 14:30. See *State v. Harry Roberts*, 331 So.2d 11, 16 (La. 1976), relying on *State v. Hill*, 297 So.2d 660 (La. 1974). (The *Hill* case involved section 4 of La. R.S. 14:30). Moreover, it is immaterial that in its opinion in the present proceeding, handed down before *Stanislaus Roberts* was decided, the Louisiana Supreme Court maintained the validity of all five sections of the Louisiana first degree murder statute rather than specifically addressing itself to the constitutional soundness of section (2) only, under which Harry Roberts was prosecuted. No citation of authority is needed in support of the elementary proposition that the whole includes all of the parts, and that in finding La. R.S. 14:30 constitutionally healthy in its entirety and in affirming the conviction and sentence herein, the Louisiana Supreme Court as a matter of course passed on the constitutionality of section (2) thereof, which furnished the basis for the first degree murder charge against Harry Roberts.

Further, there is no reason why the Louisiana courts should have an opportunity to consider the validity of the mandatory death penalty imposed on Harry Roberts in the light of this Court's later decision in *Stanislaus Roberts v. Louisiana, supra*. *Stanislaus Roberts* concerns the constitutional validity of Section 1 of La. R.S. 14:30 ("When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . armed robbery"), and is easy to distinguish from narrowly drawn Section 2 thereof, under which the instant prosecution was brought ("When the offender has a specific intent to kill, or to inflict

great bodily harm upon . . . a peace officer who was engaged in the performance of his lawful duties.")[2]

2. Former La. R.S. 14:30 Has Not Been Retroactively Repealed

In the brief which he has filed in this Court counsel for petitioner contends that because La. Act 657 of 1976, by which the Louisiana Legislature amended and reenacted La. R.S. 14:30, did not specifically exempt prior first-degree murders from its routine final clause repealing "all laws or parts of laws in conflict herewith", it necessarily follows that under Louisiana law all individuals who committed first degree murder prior to October 1, 1976, the effective date of La. Act 657 of 1976, were, by this omission, legislatively granted a full and complete pardon absolving them from all criminal liability for their crimes! In support of this novel theory counsel for petitioner relies on two old Louisiana cases — *State v. Bienvenue*, 207 La. 859, 22 So.2d 196 (1945), and *State v. Thomas*, 149 La. 654, 89 So. 887 (1921) — neither of which, in the respectful belief of the State of Louisiana, furnish a shred of support for such an amazing contention.

State v. Bienvenue, 207 La. 859, 22 So.2d 196 (1945), for example, involves the April 27-28, 1944, offense of gambling which was charged in two bills of information based on the provisions of Act 70 of 1908, which act was expressly repealed in 1942, two years before the gambling took place. In other words, in *Bien-*

2 It was following this Court's limiting order of November 29 herein that the State of Louisiana applied to the Supreme Court of Louisiana for a rehearing in *State v. Johnson Washington*, no. 55,-806, (La. Nov. 30, 1976), also involving the murder of a peace officer.

venue the statute upon which the charge was based had been repealed two years before the crime was even committed, a situation easy to distinguish from the instant proceeding in which the statute upon which the charge is based was amended and reenacted not only long after the commission of the offense, but also after the accused had been convicted, and this conviction had been affirmed on appeal.

Further, in *State v. Thomas*, 149 La. 654, 89 So. 887 (1921), the accused was charged with perjury by swearing, on January 12, 1917, before a deputy registrar of voters. He filed a Motion To Quash, which was maintained in the trial court, and the State appealed. The Louisiana Supreme Court affirmed, pointing out that Section 28 of Act 195 of 1916, the law in force at the time of the offense, was repealed by Section 10 of Act 166 of 1920, which was enacted by the Legislature after the commission of the crime for the purpose of changing the penalty for such false swearing from that of perjury, which was necessarily imprisonment at hard labor for a term not exceeding five years, to imprisonment for not more than one year either with or without hard labor. The Louisiana Supreme Court's opinion in *Thomas* concluded by stating that as the penalty for the crime had been greatly reduced, and because the new act contained no saving clause, it was the Legislature's intent that the new law would take the place of the old, and that the accused therefore had been legislatively pardoned.

Unlike the action of the Louisiana Legislature in *Thomas*, there is nothing in the enactment by the Louisiana Legislature of La. Act 657 of 1976 which in any

fashion indicates that prior murderers are to receive a full pardon. La. Act. 657 of 1976, re-defining the crimes of first degree murder and second degree murder, as well as La. Act 694 of 1976, which provides for a new bifurcated jury procedure in capital cases by adding Articles 905 through 905.9 to the Louisiana Code of Criminal Procedure, were passed by the Louisiana Legislature a few weeks after this Court handed down its July 2, 1976, decisions in *Gregg, Proffitt, Jurek, Woodson,* and *Stanislaus Roberts,* and clearly demonstrate the firm intention of the Louisiana Legislature to punish intentional homicides with death, and to enact legislation toward that end which would be acceptable to this Court.

Furthermore, since La. Act 657 of 1976 became effective on October 1, 1976, the Louisiana Supreme Court has had occasion to affirm several first degree murder convictions based on former La. R.S. 14:30[3] — the identical law which is the basis of the present proceeding — and although the seven justices of that court are well aware of the enactment of La. Act 657 of 1976, and have the authority *ex proprio motu,* and without the issue being raised by the accused, to set aside a completely null conviction which is based on a non-existent statute,[4] none of their opinions affirming first degree murder convictions after October 1, 1976, even refer to the theory here being advanced by counsel for petitioner in his attempt to challenge the jurisdiction of this Court. See, *e.g., State v. Davenport and Richardson,* 340 So.2d 25 (1976); *State v. Smith,* 339 So.2d 829

3 The cases were, however, remanded to the trial court for resentencing to a term of imprisonment under *Stanislaus Roberts v. Louisiana.*

4 See, *e.g., State v. Daye,* 243 La. 725, 146 So.2d 786 (1962).

(La. 1976); *State v. Stanislaus Roberts,* 340 So.2d 263 (La. 1976); *State v. Johnson Washington,* no. 55,806 on the docket of the Louisiana Supreme Court, decided November 30, 1976 (presently pending on Application For Rehearing); *State v. Moore,* nos. 58,446, 58,485, 58,-588 on the docket of that court, decided December 13, 1976; *State v. Jones,* no. 58,483 on the docket of that court, decided December 22, 1976.

For the reasons set out above, the State of Louisiana respectfully submits that the procedural objections raised by petitioner in his brief in this Court have either been waived, or are totally lacking in substance.

ARGUMENT ON THE MERITS

La. R.S. 14:30 (2), before its amendment and reenactment by the Louisiana Legislature[5] shortly after this Court's July 2, 1976, decision in *Stanislaus Roberts v. Louisiana,* 428 U.S. 325, read pertinently as follows:

> "First degree murder is the killing of a human being:
>
> "* * *
>
> "(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, . . . a peace officer who was engaged in the performance of his lawful duties".

At the time of Harry Roberts' trial for the first degree murder of Officer Dennis McInerney in the instant case,[6] a verdict of guilty in such a proceeding auto-

5 See La. Act 657 of 1976.

6 August 15-16, 1974. See R. 7-15.

matically and mandatorily resulted in the imposition of the death penalty. See *Stanislaus Roberts v. Louisiana*, 428 U.S. 325 (1976). Thus, because the jury in the present matter returned a verdict of guilty against Harry Roberts, he was of necessity sentenced to death by the trial court, and the issue for decision in the instant case is whether this mandatory imposition of the death penalty is valid under the Eighth and Fourteenth Amendments' cruel and unusual punishment clause, and hence can be carried out.

It is Louisiana's position herein that former La. R.S. 14:30 (2) can constitutionally support a mandatory death penalty, and that therefore the capital sentence imposed on Harry Roberts is valid and constitutional.

1. The Statute Is Narrowly Drawn

In *Gregg v. Georgia*, 428 U.S. 153 (1976), and its companion cases decided in July of last year,[7] this Court held that the punishment of death for the crime of murder does not in itself and under all circumstances violate the Eighth and Fourteenth Amendments' ban on cruel and unusual punishments, and that under certain circumstances a sentence of death is valid and constitutional, but that capital punishment cannot be imposed in an arbitrary and capricious manner by the unfettered discretion of the sentencing body.

7 *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

Significantly and pertinently, neither of the mandatory death penalty statutes considered by this Court in *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Stanislaus Roberts v. Louisiana*, 428 U.S. 325 (1976), was limited to an extremely narrow, clearly defined category of homicide such as we have in the instant case in La. R.S. 14:30 (2);[8] rather, both *Woodson* and *Stanislaus Roberts* involved a death sentence returned pursuant to a law imposing a mandatory capital penalty for a broad range of killings. Thus, what this Court repudiated in *Woodson* and *Stanislaus Roberts* was not mandatory capital punishment per se, but, rather, a mandatory death sentence automatically inflicted on a large class of convicted murderers who had killed their victims under widely differing circumstances.

Louisiana respectfully submits that a precise, narrowly drawn law like former La. R.S. 14:30 (2) focuses sharply on the circumstances of the particular offense; avoids the constitutional pitfalls deplored by this Court last July in *Woodson* and *Stanislaus Roberts;* and eliminates the arbitrariness and capriciousness criticized in those earlier proceed-

8 Stanislaus Roberts was convicted and mandatorily sentenced to death under the first paragraph of La. R.S. 14:30, which defines first degree murder as the killing of a human being "When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery". Woodson and his coaccused Waxton were convicted and mandatorily sentenced to death under a North Carolina law which states that a murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. See N.C. Gen.Stat. § 14-17 (Cum.Supp. 1975); *Woodson v. North Carolina*, supra.

ings. A statute such as La. R.S. 14:30 (2), it is respectfully submitted, can constitutionally support a mandatory death sentence.

2. The Louisiana Policeman-Murder Law Incorporates An Aggravating Circumstance.

The Louisiana statute under which Harry Roberts has been sentenced to death in the present case made it a capital offense, mandatorily punishable by death, to kill a police officer engaged in the performance of his lawful duties when the offender had a specific intent to kill or to inflict great bodily harm. See former La. R.S. 14:30 (2).

One of the aggravating circumstances which is often found in statutes defining such circumstances for jury consideration in separate sentencing procedures in capital cases is the killing of a police officer who was engaged in his lawful duties, or some variant of this theme. See, *e.g.*, *Gregg v. Georgia*, supra, in which this Court approved a Georgia law providing that before a convicted person could be sentenced to death (except in cases of treason or aircraft hijacking) the sentencing body must find beyond a reasonable doubt one of ten aggravating circumstances, one of them being that the murder was committed against a peace officer who was engaged in the performance of his official duties; see also *Proffitt v. Florida*, 428 U.S. 242 (1976), from which it appears that one of the approved aggravating circumstances considered by a sentencing body in Florida is the fact that the capital felony was done for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; see, too, Model Penal Code, § 210.6 (3) (f) (Proposed Official Draft, 1962), p. 132.

Consequently, it follows that in rendering the intentional killing of an on-duty peace officer a mandatorily capital offense, Louisiana simply incorporated into paragraph (2) of its first degree murder law one of the universally approved statutory aggravating circumstances, with the result that the Louisiana statute at issue requires that the jury focus on the particularized nature of the crime and find beyond a reasonable doubt the existence of a statutory aggravating circumstance before the mandatory death penalty may be imposed. Compare *Jurek v. Texas*, 428 U.S. 262 (1976), in which this Court said pertinently:

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose."

3. No Mitigating Circumstances Are Possible.

But does a sentencing system that allows a jury in a capital case to consider only aggravating circumstances and no mitigating factors meet the requirement of the Eighth and Fourteenth Amendments that punishments be neither cruel nor unusual?

The State of Louisiana is of the respectful opinion that such a sentencing system is valid and constitutional at a trial involving the intentional killing of a peace officer on duty, for the reason that, in Louisiana's view, there are absolutely no mitigating factors possible when a police officer on official business is intentionally killed. The individual offender in such a case can have no worthwhile attributes which might redeem the heinous act of murdering a peace officer.

If the rule of law and the orderly conduct of our society are to be preserved and fostered, no violent physical attack of any kind on a peace officer engaged in the exercise of his duties can ever be tolerated, condoned, excused, or made acceptable. It is firmly settled in the constitutional law of the United States that persons who are illegally arrested or searched have their remedy in our courts of law. They must not be permitted to take matters into their own hands, but, rather, must be made to express their grievances through recognized legal channels. The police officer, as the symbol of law and government, must be viewed as physically unassailable while performing his official acts, for if the front line guardian of the law is not protected at all times from physical abuse and death, the existence of the rule of law itself and the orderly structure of our entire society are directly threatened.

Police officers are often outnumbered by those upon whom they must impose their authority; they are continually asserting the power of the state over desperate, violent persons. Therefore, they can only be

successful in peacefully controlling the volatile situations which they continually face if they are clothed with the indicia of invincibility. It is not the police officer as a human being, but rather as the incarnation of the state, who must, while on duty, be insulated from brutal attack; a murderous act against him must be forbidden in all situations; and the news must be broadcast throughout the land that a person who intentionally kills a police officer performing his duty will pay for the act with his life.

Any other view, the State of Louisiana respectfully suggests, gravely weakens the prospects in America for an orderly, law-abiding society.

4. The Louisiana Responsive Verdict System Did Not Render The Louisiana Police-man-Murder Law Capricious In Its Results, Nor Was Appellate Review Of The Mandatory Death Sentence Necessary

At the time of Harry Roberts' trial and conviction for the murder of Officer Dennis McInerney (August 15-16, 1974), Article 814(A)(I) of the Louisiana Code of Criminal Procedure[9] provided that the responsive verdicts which the jury could render in a first degree murder case were: guilty, guilty of second degree murder, guilty of manslaughter, and not guilty.[10]

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9 As amended by La. Act 126 of 1973.

10 For a definition of second degree murder and manslaughter under Louisiana law at the time of the instant trial, see La. R.S. 14:30.1, as added by La. Act 111 of 1973, and La. R.S. 14:31, as amended by La. Act 127 of 1973.

The State of Louisiana believes that under the circumstances of the instant case these responsive verdicts in no way rendered the mandatory death penalty required by the Louisiana policeman-murder law violative of the Eighth and Fourteenth Amendments.

The trial judge in the present case instructed the jury at length concerning the possible verdicts they could return — not guilty; guilty as charged, which would be guilty of first degree murder; guilty of second degree murder; and guilty of manslaughter. He defined clearly the elements of, and the punishment required for, each crime, and succinctly explained to the jury in everyday language the differences between the three offenses. Thus, he instructed the jury that the essential elements of first degree murder were that a police officer engaged in the performance of his official duties had been killed, and that the wound was inflicted with the specific intent to either kill or to inflict great bodily harm, "without any excuse or justification"; that the essential elements of the crime of second degree murder were identical with those of first degree murder "with the exception that second degree murder does not have any provision as to a police officer or a fireman who would be engaged in his official duty"; and that manslaughter was a killing committed under the influence of passion induced by serious provocation.

Furthermore, the trial judge in the present proceeding charged the jury as follows:

> "Now, should you entertain a reasonable doubt as to the grade of the offense committed,

> it would be your duty to find the defendant guilty only of that grade of which you are convinced beyond a reasonable doubt of which (sic) he is guilty."

In connection with the foregoing, see Charge To The Jury By The Court, August 16, 1974, a certified copy of which has been forwarded to this Court.

The State of Louisiana is of the respectful belief that in his charge in this case the trial judge provided the jury with standards to channel their judgment as to whether or not the accused was guilty of intentionally killing a police officer engaged in performing his lawful duties, and that these instructions, coupled with the extreme narrowness of the statute which formed the basis of the first degree murder charge against Harry Roberts, render the mandatory death sentence here at issue acceptable under the Eighth and Fourteenth Amendments.

Further, because of these same factors no appellate review by the Louisiana Supreme Court of the mandatory imposition of the death sentence was necessary to ensure that it was not the capricious result of an arbitrary exercise of unfettered jury discretion.

CONCLUSION

In conclusion, it is respectfully submitted that because the Louisiana first degree murder law involved in this case is narrowly drawn, focuses on the particular circumstances of the crime, and incorporates into itself a statutory aggravating circum-

stance; and, further, because no mitigating circumstance is possible in the murder of an on-duty police officer, and the trial judge's instructions to the jury concerning the various responsive verdicts were precise and clear, the mandatory capital sentence imposed on petitioner herein is constitutional under the Eighth and Fourteenth Amendments, and should be carried out.

Therefore, the State of Louisiana respectfully asks this Honorable Court to uphold the judgment of the Louisiana Supreme Court affirming the conviction and mandatory death sentence of Harry Roberts.

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CERTIFICATE

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